*Supreme Court of Wisconsin.*

WHITING v. SHEBOYGAN RAILWAY COMPANY.

A tax for a *private purpose* is unconstitutional, and a statute imposing it is void. A public use or purpose is essential to the idea of a tax.

The rights of *taxation* and of *eminent domain* are separate and distinct rights, and the *public use* sufficient to support legislation for one purpose is not necessarily sufficient to support it for the other.

The public use, which justifies the exercise of eminent domain, consists in the possession and enjoyment of the land itself by the public or public agencies, and not in the mere incidental advantages that may accrue to the public from the enterprise.

The possession by the public, which constitutes the public use, in the case of railroads and similar corporations, in whose favor the right of eminent domain has been exercised, consists in the fact that the corporation must perform its duties for the public on tender of the proper compensation, and the fact that the state retains the right to control the franchise and limit the tolls to be charged.

But such a qualified and limited public use will not support *taxation* for the sole and direct benefit of the corporation.

Therefore, a statute levying a tax for the sole purpose of making a direct gift of the money raised, to a mere private railway in which the state or the taxpayers have no ownership, is unconstitutional.

The facts of the case sufficiently appear in the opinion of the court.

*J. C. Sloan* and *Bennett & Norcross*, for plaintiff.

*Matt. H. Carpenter*, and *J. A. Bently*, for defendant.

The opinion of the court was delivered by

DIXON, C. J.—These are two appeals in the same action, the one by the plaintiff from a final judgment dismissing his complaint, and the other by the defendants from a previous order of the court denying their motion to dissolve and vacate a preliminary injunction which had been granted in the cause on the application of the plaintiff. The question involved in these appeals is the same as that discussed in the recent case of *Curtis* v. *Whipple* (referred to in note, *infra*), and after what was there said in relation to it, a very lengthy examination will not be necessary. The question is as to the power of the legislature to raise money or to authorize it to be raised by taxation for the purpose of donating it to a private corporation. We there held that the legislature possessed no such power, and the conclusion in that case we think follows inevitably in this, from the principles stated in the opinion. The cases are not distinguishable, except in the single circumstance that the corporation here, to which it is proposed to give the money, is a railroad company, in behalf of which the power of eminent domain has been exercised by the state for the purpose of enabling it to secure the land over which to build its road. It is contended that this

circumstance so completely separates the cases as to render wholly inapplicable, to a railroad company, a fundamental principle with regard to the power of taxation which controls as to all other private corporations and prohibits the making of similar donations to them: in other words, that it changes the corporate character of such company and transforms it from a private into an altogether public corporation, so that the people may be taxed for the purpose of giving the money directly to it.

If this position were correct, then undoubtedly the deduction would be that the taxation is valid. But we deny the correctness of the position, and, on the contrary, affirm that though a railroad company may be, as to its capacity to assume and exercise in the name of the state the power of eminent domain delegated to it, so far a public or *quasi* public corporation, yet in all its other powers, functions and capacities, it is essentially a private corporation, not distinguishable from any other of that name or character. As to the use of the land for the purpose of a highway, and the right of the public to pass and repass over it, and to enjoy the advantages afforded by it for the transportation of merchandise and productions of the country, from one place to another, upon the payment of reasonable fare or charges, the corporation may be said to be public, but in all other respects it is private. The public having the power for itself to condemn the land on payment of just compensation, and to build, equip and operate the road, and to charge toll or fare for its use, or for the carriage and transportation of passengers and merchandise, that power, subject to the continued enjoyment by the public as a matter of right and not by the permission of the corporation only, of the same benefits of carriage and transportation upon the same conditions as to payment of fare and charges, may be exercised in behalf of a private corporation, and so far changes its character, but no further. That such is the true corporate character of a railroad company is a proposition, we think, requiring very little argument or elucidation. It is plain to the mind of every intelligent person who has given the subject the slightest consideration. The road, with all its rolling-stock, buildings, fixtures, and other property pertaining to it, is private property, owned, operated and used by the company for the exclusive benefit and advantage of the stockholders. This constitutes a private corporation in the fullest sense of the term, and were we to attempt to distinguish between such a corporation and an incorporated institution of learning like that in *Curtis* v. *Whipple*, and to show that money might be raised by taxation, to be given to the former, but not to the latter, it would be a task which we should despair of accomplishing to the satisfaction of any one not far more skilled in the subtleties of the law than we ourselves profess or ever expect to be.

And if we examine any book of authority on the subject, we shall find that such is and always has been the rule of the law as to the corporate character of such companies, notwithstanding the delegation of the power of eminent domain, and their consequent subjection in a certain degree to public use and convenience. They

are always classed among private corporations, such as banking, insurance and manufacturing corporations, and corporations for the building of bridges, turnpikes, canals, &c. Messrs. Angell and Ames, in their work on corporations, section 40, expressly so classify them, and speaking of them in connection with those last above named, say: "The latter kind have a concern with some of the expensive duties of the state, the trouble and charge of which are undertaken and defrayed by them in consideration of a certain emolument allowed to their members." As a matter of law, the duties of railroad companies to receive and carry passengers and goods, differ very slightly, if at all, from those of other common carriers of passengers and goods, whether private individuals or copartnership or incorporated bodies. All common carriers are bound to receive and carry when paid or tendered a reasonable compensation. The public use and convenience is the same with one class of common carriers as with another—the same with an incorporated stage-coach or steamboat company as with a railroad company, and yet no one, we think, would pretend that taxation could be resorted to for the purpose of aiding the former, while all the property, gains and emoluments, belong to the individual stockholders. All private corporations are more or less for public use. If they were considered of no public utility or advantage it is presumed they would never be chartered. It enters into the very definition of a private corporation, that is given in *Bonaparte* v. *The Camden and Amboy Railroad Company*, 1 Bald. C. C., 223, that they are for the public use and convenience. Mr. Justice BALDWIN says: "Private corporations are for banks, insurance, roads, canals, bridges, &c., where the stock is owned by individuals, *but their use may be public.*" And Messrs. Angel and Ames, section 31, after quoting this language, add: "In all the last-named, and other like corporations, the acts done by them are done with a view to their own interest, and if thereby they incidentally promote that of the public, it cannot be reasonably supposed they do it from any spirit of liberality they have beyond that of their fellow-citizens. *Both the property and sole object of every such corporation are essentially private*, and from them the individuals composing the company corporate are to derive profit."

But a railroad company, like a company for running stage-coaches or steamboats, might be incorporated, and the road built, equipped and operated, the public use and convenience being the same, without the delegation of the power of eminent domain. Money will secure the title to land over which to build a road by contract with the owners, and it is a matter of policy, on the part of the state, whether it will delegate the power of eminent domain or not. If a road were built and operated by such a company, could money be raised by taxation for the purpose of giving it to the company? Or if a railroad were built by one or more individuals, without any act of incorporation, and without the exercise of the power of eminent domain, as it is conceived might be done, could the people be taxed in order to give the money to such individual or individuals? Can a railroad be built and put in running order by direct taxation, and

then the whole property transferred by act of the legislature, without compensation or equivalent, to one or more private individuals, or to a corporation composed of such individuals, created for the purpose of receiving it? Or can a corporation, composed of one or more individuals, be created for the purpose of owning and operating a railroad, and holding and enjoying all its gains and emoluments, and at the same time the charter provide that the corporators or stockholders shall pay nothing, but that the road shall be built, equipped and put in running order at the expense of the people, to be defrayed by taxation? We believe that the legislature does not possess these powers, and that these questions must be answered in the negative.

Such proceedings, provided they were proper or could be sustained, would deserve the opprobrious epithet given to them by Judge JAMES, in *Sweet* v. *Hurlbert*, 51 Barb., 316, where, speaking of an Act of the Legislature of New York precisely like that involved in these appeals, says: "If this can be done, it is legal robbery; less respectable than highway robbery, in this, that the perpetrator of the latter assumes the danger and infamy of the act, while this act has the shield of legislative responsibility."

If, as we have supposed, the granting of the right of eminent domain to a railroad company, may so far change its corporate character as to clothe it with the power of the state, and in consideration of the emoluments allowed to its members, charge it with the performance of a duty of the state, namely: that of providing suitable and proper thoroughfares through it for the benefit and convenience of the people, we have still endeavored to show that the character of the company remains in every other respect the same as if no such grant had been made. Nor is the mixed public and private character of the company anything strange or anomalous in the law of corporations. It is well known, for example, that a state may take upon itself the character of a private citizen or corporation, by becoming a partner or stockholder in a private trading company or corporation, and that public and municipal corporations may stand in respect to some things, as grants made to them by the state or under its authority, on the same footing as would any individual or private corporation, upon whom a like special franchise may have been conferred: Angell and Ames on Corp., s. 31, 32, 33, and cases cited. Our conclusion, therefore, is, that though a railroad company may possess this single exceptional characteristic, it is, nevertheless, essentially a private corporation, coming fully within the operations of the principles laid down in *Curtis* v. *Whipple*, and that the taxation complained of cannot be sustained. This conclusion is fully supported by the case of *Hansen* v. *Vernon*, as yet unreported, in the Supreme Court of Iowa, December term, 1868, and the case of *Sweet* v. *Halbert*, above referred to, which are the only cases known to us where the question here presented has been directly raised and decided by the courts. The opinions in both cases are very able, and clearly and fully sustain the position taken by counsel in the able arguments made at the bar in this case.

It only remains for us to add a few words, if indeed the same can

be thought necessary, by the way of distinguishing between this and those numerous cases where it has been held that cities, towns and counties can subscribe for the stock in a railroad company, and discharge the debt thus incurred by the assessment and levy of taxes. The principle upon which such taxation has been sustained will readily appear by a reference to the opinion in *Curtis* v. *Whipple*. The city, town or county becomes a part owner of the road to the extent of the stock taken, and the work being one in which the public might have engaged as a sole owner and paid for entirely out of the public funds, it has been considered that there was no valid objection to its becoming a part owner thereof as a stockholder in a private corporation, which has undertaken to do the same work. To the extent of the stock taken, the city, town or county is directly interested and benefited by the money expended in the work, the same being a matter of public concern, and it is, in our judgment, upon this principle and this alone that the taxation in that class of cases can be sustained. In saying this of course we do not intend to exclude the idea found in all the cases, that the road must be one situated within or passing through the corporated limits of the municipality to be taxed, and so promoting the general prosperity and welfare of the people who are to pay the taxes: Cooley, Const. Limitations, 214, and cases cited. The two things must unquestionably concur in order to sustain the tax, but the last alone, which may be termed the benefit incidentally arising to the public, is clearly insufficient for that purpose. The property in the road having, by the creation of the corporation and the franchises granted to it, been converted into private property devoted exclusively to the gains and emoluments of the individual stockholders, the incidental benefits accruing to the public by reason of the investment can no more sustain a tax than the like incidental benefits arising to the public from the employment of the capital or labor of the citizens in any other business or enterprise of a purely private character. For if such incidental public benefits or advantages alone will support a tax for a donation of money to persons or corporations engaged in one kind of private business, then they certainly must in another, and if it should be shown, as it undoubtedly can, in numerous towns and places, that the establishment of mills and manufactories would be greatly beneficial to the inhabitants, far more so, perhaps, than the building of a railroad, then it would follow that the people of such towns and places could be taxed for the purpose of giving the money to persons or corporations proposing to build such mills or manufactories. This last is a proposition upon which no one will insist, and we are clearly convinced that that contended for in this case is equally untenable.

A rehearing having been granted, and the case having been very elaborately argued, the opinion of the court was again delivered by

DIXON, C. J.—[After some preliminary observations on the range of the argument made by counsel.]

First, as to the cases in this court, from the opinions in which

counsel quote so largely, and upon which they rely so confidently, it seems hardly necessary to add to our former remarks. Those cases are clearly distinguishable from this as ever one case was from another. They were all cases of taxation for the direct and immediate benefit of the public—to improve a harbor, which was public property—to save from destruction the streets and site of a populous town, also public property—and to secure soldiers to protect and defend the country in time of war, always recognized as a public object of the greatest magnitude and importance. With these objects in view, it seems very strange that the language of the court should be severed entirely from the facts of the case before it, and the attempt to be made to apply it to a wholly different state of facts, where the object of the tax is to promote a strictly individual enterprize and add to or enhance the value of merely private property.

Again it is said that every case in which the exercise of the power of eminent domain in behalf of one of these private railroad companies has been upheld, is an authority clear and positive against the decision now made. The correctness of this conclusion depends upon the correctness of the premises from which it proceeds. It is assumed as the foundation that that which is a public use so as to justify the exercise of the power of eminent domain, is also a public use, which will, under all circumstances, justify the exercise of the power of taxation. It is assumed that no difference exists in public uses, but that all are alike, and that a public use once established with respect to one of these powers, is necessarily a public use with respect to the other. And this we think to be the great mistake upon this point. It arises from considering two things alike which are in reality different. It ignores all distinction between different public uses and the effect which such differences may have in determining the legislative authority. That public uses differ very widely from each other is a proposition which no one can deny. They differ in nature and kind, and in the degree or extent of the public enjoyment. There may be various degrees of the same kind of public use. It may be more extensive and complete in one case than in another. Certain uses are *per se* public, such as of public highways, public buildings and the channels of public rivers. Others have been declared public by the decisions of the courts, as of railroads, turnpike-roads, public ferries, toll-bridges and the like. But these last have as yet been declared public only with respect to the power of eminent domain. Now, as there exists this variety and difference of public uses, the question arises whether in the case of this railroad company a distinction is to be taken between a public use which will authorize the exercise of the power of eminent domain and one which will justify a resort to the power of taxation to promote the same object. And we think that there is such distinction. These powers are not identical, though both must be exercised for a public purpose or not at all. There are many public uses for which taxes may be levied that have not as yet been held to authorize the condemnation of private property, though suitable or convenient for the same public uses. Taxes may be levied to build a

state capitol, court-house, public school buildings, jails, a state prison, an asylum for the insane, &c., but recourse to the power of eminent domain to obtain the land upon which to erect such buildings would be something new in the legislative and judicial proceedings of this country. "Who ever heard," says WOODBURY, J., in *West River Bridge Company* v. *Dix*, 6 How (U. S.), 546, "of laws to condemn private property for public use for a marine hospital or state prison? So a custom-house is a public use for the General Government, and a court-house or jail for a state. But it would be difficult to find precedent or argument to justify taking private property, without consent, to erect them on, though appropriate for the purpose." But it may be said that this difference only exists by reason of the greater public necessity required to justify the exercise of the power of eminent domain, and that it shows that the power of taxation is the more general and extensive of the two. Be it so. We only refer to it for the purpose of showing that such difference does or may exist in particular cases, and when that is shown, the fact that there may be other differences in other cases, and which may lead to other conclusions, seems altogether less improbable. As has already been said, we think there exists a difference here, and that it is such that, though the power of eminent domain may be exercised, yet the power of taxation, as here claimed, cannot be. And in order to understand this, it will be necessary to precisely ascertain and define the nature and extent of that public use which, in the case of these private railroad companies, has been held sufficient to authorize the exercise of the power of eminent domain in their behalf. And first let us rid the question of some considerations which, for want of proper care and attention, have too often been most erroneously supposed to enter into it. Of such considerations, the principal and most important one is that the public use which justifies the exercise of the power, in some way consists in the general benefits and advantages accruing to the public at large from the creation and operation of these works of internal improvement. It is very clear that the public use does not in any manner consist of these, for if it did, then every enterprise of business prosecuted for private gain or emolument, and by which the public prosperity and welfare is also promoted, would be a public use, and, as such, would justify the exercise of the power of eminent domain in behalf of the persons and corporations so engaged, and, according to the doctrine of those who differ from us in opinion, likewise the power of taxation, to donate money and property to such persons and corporations. There are very many enterprises and occupations of a private character connected with trade, commerce and manufacturers, which are quite as much to our advantage as a people, and quite as necessary and indispensable to our growth and prosperity as a nation, as the building and operating of railroads, and some are even more so. Senator MAISON, in that part of his opinion quoted by counsel in support of this motion, after dilating upon the great public advantages afforded by the introduction of railroads, says: "next to the moral lever power of the press, should be ranked the beneficial influence of railroads in their effects

upon the vast and increasing business relations of the nation, and the promoting, sustaining and perpetuating the happiness, prosperity and liberty of the people:" *Bloodgood* v. *M. & H. R. R. Co.*, 18 Wend. 48. Here then we have, in the leading authority cited and relied upon by the learned counsel, the admission, the truth of which no one can dispute, that there are private business occupations in which the people at large are more deeply interested and by which they are more greatly benefited than by the building and operating of railroads; and if the benefits and advantages accruing to the public from the latter, while in the hands of private corporations, and used and operated for the sole gain and emolument of the stockholders, constitute a public use which will justify a resort to the power of taxation for the sake of giving the money to such corporations, who shall say that the benefits and advantages derived by the public from the former will not sustain the same proceedings in order to donate the funds to the persons or corporations whose time and capital are thus beneficially employed therein? Who shall say that the power of eminent domain may not be exercised and taxes levied for the encouragement and support of the newspaper and periodical press of the country? Who shall say that donations and benevolences drawn from the pockets of the people by taxation may be given to the champions of the New York and Erie Railroad, and that they may not be given to the Harpers or the Appletons? Who shall set Franklin Square against Wall street and claim that taxes may be levied to give to the latter but not to the former? The majority of this court has decided that upon considerations like these, taxation cannot be resorted to for either purpose, and to that decision it is proposed to adhere until some more satisfactory ground for discrimination can be shown than has yet been made to appear. It is obvious if public benefits and advantages of this kind, and which may be properly called incidental, constitute a public use which will justify a resort to either of these sovereign powers of government, that then all distinction between public and private business, and public and private purposes, is obliterated, and the door to taxation is opened wide for every conceivable object, by which the public interest and welfare may be indirectly or in any wise promoted. Such a doctrine would be subversive of all just ideas of the powers of government, and destructive of all rights of private property, leaving every man's estate to be held by him as a mere grace or favor received at the hands of the legislative body. And such is the consequence of looking to these incidental public benefits and advantages as *the public use*, which will justify the exercise of these high governmental powers; and those gentlemen, who, like Senator MAISON and others, have in words of studied eloquence labored to depict such benefits and advantages, thinking that they were thereby demonstrating that such legislation was justifiable, were never more mistaken. The same eulogies might, and with equal or more truth, be applied to the press, to domestic manufacturers and to many other things, by which the general happiness and prosperity of the people have been equally or more greatly pro-

moted. The incidental public benefits or advantages, though in a general sense to be considered, do not, therefore, constitute in the sense of the law a public use, which will justify the interference of the government, and the question is in what does such use consist in the case of these railroads owned and operated by private corporations? We have seen that certain uses are *per se* public and that others have been pronounced so by the courts, and among the latter railroads. Eminent domain is the right of the government to seize private property for public use, upon payment of just compensation to the owner. It is a power which must be exercised by the government or sovereign, and for the public use only. It cannot be delegated. "The *public use*," says Judge COOLEY, in his excellent Treatise on Constitutional Limitations, 531, "implies a possession, occupation, and enjoyment of the land by the public, or public agencies." And further on, in commenting upon the same subject, he notices the broad language of Chancellor WALWORTH, in *Beekman* v. *Saratoga & Schenectady R. R. Co.*, 3 Paige, 73, and which is quoted and made emphatic by counsel here that, "if the public interest can be in any way promoted by the taking of private property," the taking can be considered for a public use. Judge COOLEY observes, what must be obvious to every one who has thoroughly considered the subject, that it would not be safe to apply with much liberality this language of the learned chancellor. We refer to this definition of the learned writer, as being the most clear, concise and correct general definition of what constitutes the public use, which justifies the exercise of power of eminent domain, that has anywhere fallen under our observation. It appears then that the *public use* consists in the *possession, occupation and enjoyment of the land itself by the public, or public agencies*, and not in any incidental benefits or advantages which may accrue to the public from enterprises of this nature. But the question before us calls for a more precise definition as to how it is that the public may be said to possess, occupy and enjoy the land condemned for the use of these railroad companies. And here again we must refer to the opinion of Mr. Justice WOODBURY, whose clear ideas and firm grasp of legal truths seem never once to have forsaken him. In the case first above cited, after speaking of certain uses which could not be deemed public so as to justify the application of the principle of eminent domain, and specifying some of those things which are necessary to constitute a public use of a toll-bridge, turnpike, or railroad, he says, in addition that it "*must be under public regulations as to tolls, or owned, or subject to be owned by the State*, in order to make the corporation and object public, for a purpose like this." And as was customary with him, he cites many authorities to the point, and then proceeds: "It is not enough that there is an act of incorporation for a bridge, or turnpike, or railroad, to make them public, so as to be able to take private property constitutionally, without the owner's consent; but their uses and objects, or interests must be what has just been indicated—must in their essence, and character, and liabilities be public within the meaning of the term 'public use.' There may be a private bridge as well as a private road

or private railroad, and this with or without an act of incorporation." And Chancellor WALWORTH, in *Beekman* v. *Saratoga R. R. Co.*, 3 Paige, 75, likewise states the true nature of the public use when he puts it on the ground that "the legislature may *from time to time regulate the use of the franchise and limit the amount of toll which it shall be lawful to take*, in the same manner as they may regulate the amount of tolls to be taken at a ferry or for grinding at a mill, unless they have deprived themselves of that power by a legislative contract with the owners of the road." And in the leading case of *Railroad Co.* v. *Chappell*, 1 Rice, 398, cited by Judge WOODBURY and likewise by counsel here, it is said that a railroad to be deemed a highway should be *kept under public control.* The public use, therefore, which has been held to justify the application of the doctrine of eminent domain in the case of these railroads owned and operated by private individuals, consists in the fact that the owners cannot, without reasonable excuse, refuse to receive and transport passengers and freight when offered at usual rates, and in the fact that *the state retains the power to regulate and control the franchise and limit the amount of tolls which it shall be lawful for the owners to charge.* The use consists in these facts and these alone. And as a man may be said to possess and enjoy the estate of another, the use of which by that other he may regulate and control so that it shall not be turned to his detriment or disadvantage, so the public, through this reserved power of the state, may be said to possess and enjoy the land condemned for use by these railroad companies. And this is the public use which has been held to justify the exercise of the power of eminent domain in behalf of such corporations; a power which, by the barrier erected by the constitution requiring payment of full compensation to the owner, is far less susceptible of legislative abuse and far less dangerous to private right than the power of taxation. And here it occurs to us to observe that under the principles announced in the Dartmouth College case and in the numerous cases which have followed it in the same court, and by the authority of which the courts of all the states are bound, this power of the state to regulate and control the franchise and fix the amount of the tolls, and without which the public use cannot exist, has frequently been wholly lost. The doctrine of these cases that the charters of such corporations are contracts between the state and the corporators or stockholders, and, as such, irrevocable and unchangeable at the will of the legislative body which granted them, unless the power to alter or repeal is expressly reserved, overturns entirely the principle upon which the power of eminent domain has often been exercised in behalf of corporations thus chartered and organized. It is totally inconsistent with the ground upon which that principle has been held to apply, that the power and control of the state, and consequent public use, should be thus extinguished; or that such power and control should be exhausted by the legislature having regulated the toll or fixed the rates for carriage and transportation in the first instance; or that it should be competent for the legislature in any manner or by any contract with the corporation or its promoters or stockholders to part

with its authority in the premises. A corporation of this kind, which is above the power and control of the state in these particulars, is not for the public use so as to justify the exercise of eminent domain in its behalf; and it appears to us that, as to every act of incorporation thus falling within the decisions of the federal supreme court, it should have been so held. It appears to us also in the passage above quoted, that Chancellor WALWORTH, eminent as he was for sound learning and judicial ability, was inconsistent in putting the public use which would authorize the application of the principle of eminent domain upon the ground that the legislature might "from time to time regulate the use of the franchise and limit the amount of toll which it should be allowed to take," and then in admitting or supposing that the legislature might, by contract with the railroad company, deprive itself of that power. But be this matter as it may in other states, the question can never arise in this state. Our people, by a most wise provision in their constitution, have perpetually reserved the power to the legislature to alter or repeal all charters or acts of incorporation at any time after their passage: Const., Art. XI., Sec. I. In this state, therefore, the public have that use which has been held to justify the exercise of the power. The legislature, if it has not, may limit the tolls and fares to be received by this railroad company to a reasonable sum, beyond which the company shall not go. It may prevent abuses in that respect. And now that we see precisely what this public use is, its character and extent, we are the better able to judge whether it will sustain the power of taxation here claimed. We see that it is not a public use *per se*, which all agree will support taxation, but far from it. It is not that free and unrestrained use which the public has of its own property, but a mere right, on the part of the public, through the legislature, to control the franchise of the company, and regulate its use of the property belonging to it, so as to prevent oppression and avoid the imposition of unreasonable and unjust burdens upon the people who are obliged to avail themselves of these great channels of trade and communication. In *The West River Bridge Company* v. *Dix*, above cited, a critical examination into the nature and extent of this public use became necessary, and the subject was most thoroughly and exhaustively canvassed and considered. The legislature of Vermont, conceiving that it might sometime be expedient to convert the turnpike roads and toll-bridges in that state into free roads and free bridges, passed an act authorizing the Supreme and County Courts to take any real estate, easement, or franchise, of any turnpike or other corporation, when, in their judgment, the public good required a public highway, and providing that compensation should be made in same manner as in the case of highways laid out over individual or private property. Under that act the franchise and property of the West River Bridge Company, a corporation created by the laws of that state, and whose charter had some sixty years to run, were seized for public use. The company resisted the proceedings on various grounds, all of which were overruled. The cause was argued for the company by Mr. Collamer and Mr. Webster,

and on the other side by Mr. Phelps, the two latter being at that time Senators of the United States. One objection urged against the proceeding was that the property was already devoted to the public use, and that there could be no such thing as seizing it again for a public use of the very same kind. In reply to this Mr. Phelps said (and we feel no hesitancy in quoting the language of so distinguished a lawyer, judge and statesman, though used in argument, especially when such argument was fully sustained by the decision of the court), speaking of the power of eminent domain: "But the question has been agitated elsewhere and may be started here, whether a franchise granted to private persons for their private emolument, and yet for a public use, is not beyond the reach of that power. These cases being of a *mixed character*, combining private right and emolument with public convenience, the question resolves itself into two others, viz.: 1st Are the private rights thus conferred of any superior sanctity? And, 2d. Does the *partial, qualified and limited appropriation of the property to public use*, exclude the further exercise of the right of eminent domain?" And Mr. Justice McLEAN said: "The use of this bridge, it is contended, is the same as before the act of appropriation. The public use the bridge now as before the act of appropriation. *But it was a toll-bridge, and by the act it is made free. The use, therefore, is not the same.* The tax assessed on the citizens of the town to keep up and pay for the bridge may be impolitic or unjust; but that is not a matter for the consideration of the court." These references show very clearly the difference existing in public uses and that the public use in the case of a railroad owned and operated by a private corporation is but a partial qualified and limited one It is qualified and limited by the private right which the railroad company has to ask and demand of every person who uses its road a reasonable fee or toll which may be fixed by act of the legislature. And in the case of the toll-bridge which was made free by right of eminent domain, the taxes which the people paid to compensate the company for the franchise and property taken from it, became a substitute for the tolls which had been theretofore paid. Before the act of appropriation the public could use the bridge only upon paying tribute to the company, but afterwards it was free. *The proposition here is to compel the public to pay tribute and taxes too—to pay for the property and yet not to own it—to pay for it and yet pay the company for the privilege of using it.* Is there to be no discrimination upon different public uses for these different purposes? Is the *partial, qualified and limited publie use* which has been held sufficient to justify the exercise of the power of eminent domain in behalf of these private railroad companies, also to be held sufficient to justify the exercise of the power of taxation for the sole and immediate purpose of donating the moneys raised to such companies? If it is, then indeed are the proper objects of taxation greatly multiplied. The power of the legislature to regulate the tolls and charges of such companies is in itself a limited one, if not in a constitutional sense, certainly in the sense of morality and justice. If there be not an express, there is certainly an implied

obligation and promise on the part of the state, never to reduce the tolls and charges below a standard, which will be reasonable or which will afford a fair and adequate remuneration and return upon the amount of capital actually invested. This obligation and promise, which spring from the act of incorporation and invitation by the state to persons to invest their money in the stock, it is presumed no legislative body would disregard, except where the company by gross and wanton abuse of its privileges had forfeited its rights, and then instead of legislative action, it is also presumed that the regular course of judicial proceedings would ordinarily be preferred. The true intent and object of the power is that the legislature shall be able to protect the rights and interest of the people, but not that it shall arbitrarily or unnecessarily impair the rights or franchises of the company or destroy the property of its stockholders. The good faith of the state is pledged against this, and it is not within the range of presumption that it will ever be done. The individuals owning the property and whom the corporation represents, purchase it under this pledge and inducement held out by the state. To them it is a matter of mere private business, engaged in under the sanction and encouragement of the state, and for their individual gain and emolument, and the legislature will no more unnecessarily interfere with it, or with the business of the corporation where it is legitimately and properly conducted, than it will with any other private business. As yet we believe the power has never been exercised with respect to any railroad company organized in this state, and possibly it may never be. It is valuable, however, as a check upon the rapacity which these corporations sometimes exhibit, and the time may come when the legislature will be imperatively required to exert it, but when it does, if ever, it will not be to deprive the corporation or its stockholders of their legitimate rights, but to correct abuses and save the rights of the people. The legislature will not reduce the tolls or rates to an unreasonably low figure, or so as to disappoint the just expectations of the owners of stock. It will not destroy the earnings of the road or cut off satisfactory dividends upon the cash capital actually paid in, if the business of the company is such as to afford them. In fine, it will hold the company only to the receipt of *reasonable* tolls, and this with a view to the nature and extent of its business, the expenses necessarily incurred by it and the amount of capital invested. The legislature will not cut down the tolls unreasonably with a view to compensating the loss of the company by taxing the community at large, for that would be to defeat the very principle upon which all these companies are organized and roads built. That principle is that those persons should pay for the building and operating of the roads who use them and as they use them. They pay their taxes for these improvements when they pay their tolls. Regarding the reserved power in this light, and as it in fact exists and will continue to exist, and considering that it constitutes the only legitimate basis of any public use which will justify the exercise of the power of taxation here contended for, we see at once, if

the power be conceded, that there are other private business pursuits for the benefit of which, or of the persons engaged in them, taxes may also be levied. All common carriers of passengers and goods are bound to receive and carry, unless some valid excuse be shown, when tendered a *reasonable compensation.* This is the right of the people at large—of all. It is compulsory by them, and not optional with the carrier: Angell on Carriers, §§ 124 to 129, and authorities cited. If this tax be valid, why may not the people be taxed to be make donations to common carriers? And as innkeepers stand upon the same footing with respect to the rights of the public and the sums they may charge for entertainment, why may not taxes be levied for their benefit? But it may be said that the legislature has not the power to fix the sums which carriers shall charge. This is by no means certain. But if not to tax for common carriers, then certainly the power would exist to tax for the benefit of all owners of grist-mills throughout the country. In the case of a grist-mill, the private property of any person, there exists the same public use as in the case of a railroad. It differs from it in no respect whatever. The legislature may regulate and limit the tolls for grinding at its pleasure, and provide, as the legislature of this state has done, that the owner shall receive and grind the grists of others in preference to grinding his own grain. Laws of this character exist in every state of the Union, as well in those where it has been held that the right of eminent domain cannot be exercised in behalf of mill owners as in those where it has been held that it can. And in this state it is immaterial whether the head or power of water which propels the mill is created by flowing the lands of others under the authority granted by the Mill Dam Act, or only by flowing the land belonging to the owner of the mill. The act applies to and regulates the tolls and manner of conducting the business in all grist-mills moved by water: R. S. Ch., 60. When, therefore, the owner of a site and adequate mill power upon his own land becomes desirous of improving it by the erection of a grist-mill, he might apply to the legislature for an act to tax his neighbors to furnish funds for that purpose, and such act would be valid; or, having erected his dam and built and put his mill in operation, he might, from time to time, afterwards procure such taxation for his private or individual benefit, and no lawful objection could be taken thereto. For ourselves, we cannot think that this kind of public use, though it may sustain the power of eminent domain, will also sustain taxation like this, and we here end our remarks upon the point.

Again, it is said that the property in the hands of these railroad companies is public property, and therefore such taxation is justifiable. This proposition requires not much discussion. The contrary has been the settled law, both in England and this country, ever since these and kindred corporations, as plank-road companies, turnpike companies, toll-bridge companies, ferry companies and the like, have had an existence, and for the earlier authorities to this point we refer to the citations in the brief of counsel in *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 433. Not only the pro-

perty in the road, rolling stock, fixtures, and all buildings and appurtenances, is recognized and protected as the private property of the corporation, but also the franchise itself. It is subject to mortgage, lease and sale by the company, and may be seized and sold on execution against it. And, if it belonged to a natural person it might also be bequeathed or disposed of by will. "A franchise," says Mr. Justice DANIEL, delivering the opinion of the court in *The West River Bridge Co.* v. *Dix*, *supra*, "is property and nothing more; it is incorporeal property, and so defined by BLACKSTONE, volume 2, p. 20. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment." And Mr. Justice MCLEAN says in the same case: "*It is objected that this bridge, being owned by a corporation and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private.*" And, in the same case, Mr. Justice WOODBURY, speaking of the franchise, says: "It is also property, subject to be sold, sometimes even on execution, and may be devised or inherited." And further on he adds: "I concur, therefore, in the further views, that the corporation is a franchise, and all its powers are franchises, *both being property, may for these and like reasons, in proper cases, be taken for public use for a highway.*" And in *Thorpe* v. *R. and B. R. Company*, 27 Vt., 151, Chief Justice REDFIELD, in pronouncing the judgment of the court, says: "It is admitted that the essential franchise of a private corporation is recognized by the best authority as private property, and cannot be taken without compensation, even for public use." And on page 155, speaking of the case of *Swan* v. *Williamson*, 2 Mich., 427, where it was denied that railways were private corporations, he says: "But that proposition is scarcely maintainable so far as the pecuniary interest is concerned. If the stock is owned by private persons, the corporation is private so far as the right of legislative control is concerned, however public the functions devolved upon it may be." To these authorities many others might be added, but it is deemed unnecessary. And the force of the language quoted and emphasized by counsel from the opinion of Chief Justice SHAW, in *Inhabitants of Worcester* v. *The Western Railroad Corporation*, 4 Met., 566, to the effect that the real and personal property there vested in the corporation was "in trust for the public," consists in concealing or losing sight of the facts of that particular case. The act of incorporation there was peculiar, and it appears in the very next paragraph of the opinion how that trust was created. And the doctrine of the isolated case of *Erie and Northeast Railroad Co.* v. *Casey*, 26 Pa., St. R., 287, by a divided court, that after the repeal of the charter of a railroad company the property belonging to the corporation is public property, and that the state may take possession of and hold it regardless of the rights of stockholders and of the creditors of the company, is so clearly in opposition to every other adjudication upon the subject that it seems almost a waste of time to talk about it.

* * * It would be repugnant to the Constitution of the United States, as interpreted by the Supreme Court, to hold that the obligation of the contracts of such corporations could be impaired by the repeal of their charters. "The obligation of those contracts survives; and the creditors may enforce their claims against any property belonging to the corporation, which has not passed into the hands of *bona fide* purchasers, but is held in trust for the company or for the stockholders thereof, at the time of its dissolution, in any mode permitted by the local laws:" *Mumma* v. *The Potomac Company*, 3 Pet., 286. See also *Curran* v. *State of Arkansas*, 15 How., 304, and cases cited.

A further argument in support of the power is that a writ of mandamus will lie at the instance of the state to compel the company to build and operate its road, and that when the public have such an interest taxes may be levied. This seems to be a consideration of some importance; but, unfortunately for the argument, the English case cited and relied upon by counsel, has been overruled, and it is now held in England under charters very much more specific and stringent than any granted in this country, that there exists no obligation on the part of the company, either before or after entering upon the work, to complete it: 18 Eng. L. and Eq. R., 199, 211; 2 Redfield on Railways, § 192 and note 5. And in the case of *The People* v. *A. and V. R. R. Co.*, 24 N. Y., 261, it was held that no injunction could be granted at the suit of the people to prevent a railroad company from abandoning a portion of its road and removing the track; and although it was intimated that mandamus or indictment would lie, yet the whole reasoning of the court was against it. The writ has never yet been sustained in any case in this country, and Judge REDFIELD says in the note above referred to that the later English decisions "certainly conform to what has ever been regarded as the law upon that subject in this country." * * * After the people of Fond du Lac County have levied this money there is nothing in the act of incorporation or in that for imposing this tax to bind the company even to run a single car over the road, or prevent it from taking up the track and abandoning the use of the road entirely.

Another and the last point is upon the authority of those decisions in which it has been held that municipal corporations, when authorized, may become subscribers to the stock of these railroad companies. It has been said that to discriminate between cases where stock has been subscribed for and those where it has not, but the money is to be given to the company, is "to dwarf and and obscure the real nature of these works, and unduly to magnify into the place of principal, a feature which was merely casual, incidental and comparatively unimportant." Whether this appears so or not depends very much upon what our attention is given to. If we are looking to the rules and principles of law governing the subject, there would seem to be very good ground for the discrimination. To the extent of the stock subscribed the municipality *owns* the road, and it may be said to be *public* property. We have seen that whether the public *own* the property, enters very materi-

ally into the consideration of the question, whether the purpose is public or not. We all know, too, that the position of one who gives as a gratuity to a corporation is very different from that of a stockholder in it. The stockholder has certain equitable rights, which he may enforce, while the giver of the gratuity has none. The stockholder may insist upon the strict application of his money to the legitimate purposes of the corporation. He may restrain the directors and officers from squandering and misapplying it, and compel the company to use its funds in building and operating the road, according to the true intent of his subscription. He who gives money to the company, can exercise no such rights. And, besides all these, the correctness of this line of decisions, upholding municipal subscriptions to the stock of railroad companies, has been questioned by very high authority. Judge REDFIELD, says: "For ourselves we are free to confess that we never could comprehend the basis upon which so many able jurists in this country have professed to perceive clearly the reasons for giving municipal corporations the power to become stockholders in railway companies. We have always felt that it was one of those cases in jurisprudence where the wish was father to the thought:" 2 Redfield on railways, sec. 230, *note* 1. Certainly the consequences of upholding such subscriptions have been most sad and disastrous to many cities, towns and counties throughout the country; and it is obvious from the tenor of Judge COOLEY'S remarks, that the doctrine does not meet his approbation: Const. Lim. 213, 214. Shall decisions thus doubted and questioned be held to justify or compel a further step in the same direction? We think not, and are prepared to say, with Judge SHARSWOOD and the Supreme Court of Pennsylvania in the special street taxation case in Philadelphia: "Thus far shalt thou go, and no further:" *Hammett* v. *City of Philadelphia*, 8 Am. Law Reg. (N. S.) 422. Motion denied.

COLE, J.—I concur fully in the opinion of the Chief Justice.

PAINE, J., dissented.

Since (as Mr. Justice WOODWARD observed in *Philadelphia* v. *Tyson*, 35 Pa., St., 401, 404), "every man holds his property subject to the taxing power" of the state, what question is of more moment to the property owner than the one, *what is taxation, and for what purposes may property be lawfully taxed?*

The transcendent importance, theoretical and practical, of the principles involved in the foregoing opinions, as well as the vigorous and close intellectual grasp with which these principles are discussed, make these opinions well worthy of attention. The questions are entirely modern. The extent to which legislation, similar to that which was drawn in question in the main case prevails, particularly in the west, and the earnestness with which it is contended, on the one side, that such laws are not objectionable on legal principles and are salutary in their results, and on the other side, that they are palpable and oppressive invasions of the property-rights of the citizen and disastrous in their opera-

tion, invest discussions of this character with an absorbing interest.

Under an existing law of this character, in the State of Illinois, it is estimated, that within two or three years past, an indebtedness on the part of townships and towns, has already been incurred of many millions of dollars, and the amount is so constantly and rapidly increasing, that thoughtful citizens are alarmed, and the subject is arresting the consideration of the Constitutional Convention of that state, now in session.

Respecting the *policy* of such legislation, we do not propose to offer any observations. It is the *validity* of such laws that mainly concerns the jurist.

Adverting to the principal case, it may be remarked, that the burden of the defendant's argument for a rehearing was, that the taxes authorized by law under consideration, are for a purpose (and hence the law is *public* valid), because the right of eminent domain can be exercised in favor of such companies, and the property of the citizen compulsorily taken for the right of way, although the constitution in terms prohibits such taking for any other than a *public use*. The point is, that if, when property is taken for the right of way, the *use is public*, as all admit, so the *use is public* when money is taken from the citizen with which to aid the corporation to build the road.

Those who deny the soundness, must admit the plausibility of this argument.

The opinion of Chief Justice DIXON, on the motion for a rehearing, is especially valuable for its treatment of the difference in the nature of the two powers of taxation and eminent domain.

In this note we will restrict ourselves to a brief notice to a few recent adjudications, having relation to the nature and limits to the taxing power.

In *Curtis* v. *Whipple*, referred to in the foregoing opinion, but not yet reported, the case showed that the Legislature of Wisconsin, in 1866, passed an act, incorporating the *Jefferson Liberal Institute*, and authorizing local taxes to be levied and collected for its benefit. This was a private educational institute, owned by stockholders and controlled by a board of trustees. The town of Jefferson, whose people were to be taxed to support it, was not a stockholder and had no voice in its management. Nor were the taxpayers in the town, as such, stockholders, nor did they have any special rights or privileges in the institution. The taxes, when collected, were to be paid over to the treasurer of the institute, and the town or its people, had no control over the mode of expenditure. Under these circumstances, the court agreed in holding, that the act authorizing the tax was unconstitutional and void.

The court observed, that the fact that the institution was incorporated, did not make it other than a private school. "Nor," continues the court, "will the location of the institution at Jefferson, and the incidental benefits which may thereby arise to the people of the town, sustain the tax. This is not the kind of public benefit and interest which will authorize a resort to the power of taxation." Mr. Justice PAINE assented, but with hesitation, saying that he "did so with very great doubt as to its correctness." He further remarked: "It must be conceded by all, that a tax must be for a public and not a private purpose," and on the whole, although the

public has a general and indirect interest in the success of educational enterprises, he thought the tax could not be sustained. The case was distinguished from *Merrick* v. *Amherst*, 11 Allen, 500, in which the validity of a law authorizing the people of Amherst to be taxed in aid of the Agricultural College there located, was upheld.

In *Hansen* v. *Vernon*, not yet reported, but which will appear in 27 Iowa Reports, the subject of the validity of direct gifts of money to aid railway corporations in the construction of their roads, was examined by the court at great length. That case involved the validity of the Act of the Iowa Legislature of 1868, which in substance provides, that if a majority of voters of any township, city, or town, shall, at any special election, vote in favor of aiding in the construction of any railroad located as therein specified, a tax shall be levied, collectable in the same manner as county taxes, not to exceed five per cent. upon the assessed value of the property in the township, city or town. This tax, when collected, formed no part of the public revenue, but was to be paid over to the proper railroad company, as provided in the act. That the tax belonged wholly to the railroad company was obvious from the provision in the act which allowed the taxpayer to pay the amount directly to the railroad company, whose receipt should discharge him from the tax.

The essential feature of the law was regarded as being that it was a *tax* which was sought to be authorized, and that the proceeds of this tax were *donated to or given outright* to the railway companies, without making any direct return therefor to the taxpayer, who had no interest in the road by reason of such payment, over and beyond the non-taxpayer or any other citizen of the state.

The court decided against the validity of the act: holding

1. That taxation for *private* purposes is unconstitutional, and that a statute which authorizes such taxation is void, because it seeks to deprive a citizen of his property "without due process of law," contrary to the bill of rights.

2. That whether the specific *use* for which a statute proposes to take the property of a citizen, be *public* or *private*, is a judicial question, concerning which, the determination of the legislature, while entitled to great respect, is not conclusive; and the court held, that the money required by the act was not a tax (which necessarily involves the idea of a *public* purpose) but an illegal exaction under the name and guise of a tax.

The court observe "that they cannot uphold the tax in question without sanctioning the following principle, viz.: That it is competent for the legislature, because of the incidental advantages which will result to the community from the carrying out of the object of a volunteer private railway corporation, organized for pecuniary profit, to authorize a tax to be levied on the citizen and his property, to be given as a bounty to such private corporation to be used in aid of its undertaking, without any pecuniary compensation to the taxpayer being contemplated or furnished, and that such a doctrine unsettles the foundations of private rights."

So in *Sweet* v. *Hulbert*, 51 Barb., 316, an act of the legislature proposing to authorize money to be raised by taxation and donated to a railroad company, was held to be void.

In *Kirby* v. *Shaw*, 7 Harris, 258, Chief Justice GIBSON remarked: "That as regards taxation there is no limitation of it." * * "The sum of the matter is, that the taxing power must be left to that part of the government (the law making branch) which is to exercise it."

But this broad language, abdicating on the part of the courts, all control over the purposes for which taxes may be laid, has been since expressly limited in the same state in the recent case, *Hammett* v. *Philadelphia*, 8 Am. Law Reg. (N. S.), 421. Judge SHARSWOOD remarks: "There is, indeed, no clause in the Constitution of Pennsylvania, which restricts the power of taxation as is to be found in the constitutions of many of our sister states. Yet, it must be confessed that there are *necessary* limits to it in the very nature of the subject." And see also, *Philadelphia Association*, v. *Wood*, 38 Pa. St., 81; *Tyson* v. *School Direct.*, 51 Id., 9.

Taking all these cases together they may be said to settle the principle, that a statute which authorizes taxes to be levied for and given to any mere private corporation or person or purpose, is illegal; otherwise, if the purpose may fairly be said to be public; and that whether the purpose be one which it is competent to aid by taxation is ultimately a judicial question, but the courts, while not concluded by, will pay great respect to any expressed and clear opinion of the legislature on this point. The principal case distinguishes laws, such as were before the Wisconsin court, aiding roads by direct gifts without any return of stock, from laws which authorize municipal and public corporations to subscribe for and own the stock of railway companies.

Laws of the latter description have had the sanction of the judgments of the courts of most of the states; but the grounds on which they rest have never been entirely satisfactory to the profession, and the experience of the last twenty years has shown that they have been fruitful of bad results. If the distinction between the two classes of laws is sound, the weight of authority may be said to be with the doctrine of the principal case. But if that distinction cannot be maintained, then it is at present otherwise, but with an obvious tendency in the judicial mind in the direction of the doctrines of the foregoing opinions.

J. F. D.

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## *Supreme Court of the United States.*

### SUSAN P. HEPBURN *et al v.* HENRY A. GRISWOLD.

There is in the constitution no express grant of legislative power to make any description of credit currency a legal tender in payment of debts.

The words "all laws necessary and proper for carrying into execution" powers expressly granted or vested have, in the constitution, a sense equivalent to that of the words, laws not absolutely necessary indeed, but appropriate, plainly adapted to constitutional and legitimate ends, which are not prohibited, but consistent with the letter and spirit of the constitution; laws really calculated to effect objects entrusted to the government.